

APPEAL NO. 030003
FILED FEBRUARY 7, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 10, 2002. The hearing officer determined that the appellant/cross-respondent (claimant) did not injure her cervical spine in addition to her right shoulder on _____; that the compensable right shoulder injury does not extend to the cervical spine; that the claimant had disability from May 8 through July 14, 2002; that the respondent/cross-appellant (carrier) was not required to dispute the alleged cervical injury; and that the carrier had not waived the right to contest compensability of the alleged cervical injury.

The claimant appealed the “no carrier waiver” determination, arguing that the carrier had notice of the claimed cervical injury and failed to timely contest compensability, citing an Appeals Panel decision. The carrier appealed the disability issue on the basis that neither the carrier waiver nor the disability issue was properly added at the CCH, and therefore the hearing officer’s determination of disability should also be reversed. Both parties responded to the other’s appeal.

DECISION

Affirmed in part and reversed and rendered in part.

It is undisputed that the claimant had had cervical surgery in an unrelated case in 1989. On _____, the claimant, a photographer, sustained a compensable injury while preventing a large child from falling from a photographer’s table (“poser”). The claimant’s initial complaint was a right shoulder injury, which was accepted by the carrier. The claimant received treatment for the right shoulder injury and eventually was sent to a carrier independent medical examination (IME) doctor for an impairment rating. In a report dated December 11, 2001, the IME doctor, for the first time, references cervical pain stating that the claimant’s cervical pain “did not arise until later in the [claimant’s] course of treatment.” The claimant did not begin receiving treatment for a neck injury until February 25, 2002. The parties stipulated that the carrier did not file a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) disputing that the compensable injury did not extend to the cervical spine until May 13, 2002. The claimant contends that the carrier was required to dispute the cervical claim within 60 days of December 11, 2001.

A benefit review conference (BRC) was held on September 17, 2002, where the only issue was whether the compensable right shoulder injury extended to the cervical spine. There was no response to the BRC report. At a prehearing conference on October 15, 2002, the claimant verbally sought the addition of the issues of disability and carrier waiver. There was considerable discussion of extent of injury as opposed to

scope of injury issues. The hearing officer entered an order granting a continuance, reciting the claimant's contention that the carrier

must be required to specifically dispute compensability of body parts which were actually injured on the date of injury, but not asserted to have been injured until a later date and must file this specific dispute with seven (7) days of the date it receives written notice. Because the [Texas Workers' Compensation Commission] Commission's Appeals Panel has not specifically addressed this issue under this unique factual situation, good cause was found to add this issue.

EXTENT OF INJURY

The claimant initially only asserted a right shoulder injury, which was accepted and treated. There was conflicting evidence regarding whether a later diagnosed cervical injury was due to the compensable _____, incident or whether it was due to a degenerative change related to the 1989 injury and resulting cervical surgery. The hearing officer made specific findings why she did not believe the _____, shoulder injury caused or extended to the claimant's neck or cervical spine. The hearing officer's determination on this issue is supported by sufficient evidence and is affirmed.

ADDITION OF ISSUES

The carrier cites Section 410.151(b) as stating that an issue not raised at a BRC may not be considered unless the parties consent or the Commission determines that good cause existed for not raising the issue at the BRC. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7(e) (Rule 142.7(e)) provides that additional disputes may be added by permission of the hearing officer on a determination of good cause "(1) If the party is represented, the request shall: (A) be made in writing;"

The hearing officer found good cause to add the disputed issue (or issues) because the Appeals Panel "has not specifically addressed this issue under this unique factual situation." We might disagree with that comment (see Texas Workers' Compensation Commission Appeal No. 021569, decided August 12, 2002, and a number of other cases where we have applied Rule 124.3(c)); however, even accepting that finding of good cause, nowhere in the record that we could ascertain was the claimant's request made in writing as required by Rule 142.7(e). Consequently, the hearing officer erred in the addition of the carrier waiver issue. We reverse the hearing officer's order to add the issue of carrier waiver and render a decision that the carrier waiver issue was improperly added because the requirements of Rule 142.7(e) were not followed.¹

¹ Parenthetically we would note that under the circumstances of this case we believe Rule 124.3(c) would have been applicable.

The carrier, in passing, also appeals the hearing officer's order adding the disability issue on the same grounds as it contested the carrier waiver issue. However, our review of the prehearing conference record does not disclose an objection by the carrier to the addition of the disability issue and at the CCH the carrier specifically stated that it agreed to the disability issue (pages 5 and 6 of the transcript). Consequently, we hold that the disability issue was added by consent of the parties (see Section 410.151(b)) and any objection the carrier may have had was not preserved for appeal.

On the disability issue, whether the claimant's inability to obtain and retain employment at the preinjury wage (see Section 401.011(16)) was due to the compensable right shoulder injury or the claimed cervical injury was a question of fact for the hearing officer to resolve. She did so and her determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the hearing officer's decision and order on the disputed issues. We reverse only the hearing officer's order on the addition of the carrier waiver issue and render a decision that that issue was not properly added.

The true corporate name of the insurance carrier is **LUMBERMENS MUTUAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Terri Kay Oliver
Appeals Judge